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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

No. 803

IN THE MATTER

*of*

SIDNEY SARNER,
Charged With Criminal Contempt,

*Appellant.*

ON APPEAL FROM THE SUPREME COURT
OF NEW JERSEY

## MOTION TO DISMISS APPEAL AND IN THE ALTERNATIVE TO AFFIRM FINAL JUDGMENT

DAVID D. FURMAN,
Attorney General of New Jersey,
*Attorney for Appellee,*
State House Annex,
Trenton, New Jersey.

DAVID M. SATZ, JR.,
Deputy Attorney General,
*Of Counsel.*

MORTON I. GREENBERG,
Deputy Attorney General,
*On the Brief.*

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## Statement of Question Involved

1. May this Court note probable jurisdiction on an appeal from a State Supreme Court when the record shows that there was no substantial federal question before the state courts?

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

No.

IN THE MATTER

*of*

SIDNEY SARNER,

*Appellant.*

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

## MOTION TO DISMISS APPEAL AND IN THE ALTERNATIVE TO AFFIRM FINAL JUDGMENT

Pursuant to Rule 16(1) of the Revised Rules of this Court, David D. Furman, Attorney General of New Jersey, moves that this appeal be dismissed on the grounds that there is want of a substantial federal question properly advanced or expressly passed upon in the state courts or, in the alternative, that the final judgment be affirmed on the ground that the questions presented by this appeal are so insubstantial as not to warrant further review by this Court.

## Statement of the Case

This is an appeal from a judgment of the Supreme Court of New Jersey rendered January 5, 1959, printed in Appendix A of the jurisdictional statement and reported at 28 N. J. 519; 147 A. 2d 244. This judgment affirmed, on the opinion below, a judgment of the Superior Court, Appellate Division which in turn had affirmed a judgment of conviction of the appellant in the Superior Court, Chancery Division, for criminal contempt of court pursuant to N.J.S. 2A:10-1 and *Revised Rules of the New Jersey Courts* (1953), 4:87-1 (hereinafter cited as R.R.).

The undisputed facts giving rise to the contempt proceeding are as follows: The appellant's wife had instituted a matrimonial action in the Superior Court, Chancery Division. On November 7, 1957, Judge WILLIAM A. HEGARTY of the Chancery Division found that judgment for separate maintenance should be entered for the wife. On December 3, 1957, a hearing was held before Judge HEGARTY to ascertain if the appellant were able to pay alimony and counsel fees. At the hearing the appellant, evidently upset at the determination awarding separate maintenance, requested permission to address the court. Although Judge HEGARTY denied the request and said "You may sit down" to the appellant (Appendix of the Appellant in the Appellate Division, 6a-35 to 7a-5) (hereinafter cited as "Apx") the following colloquy ensued (Apx 7a-10 to 8a-25):

> The Witness: [Sidney Sarner, the appellant] "You have condoned in this Court perjury, thievery, collusion and contempt for this Court, but not only it becomes my duty to sustain the truth and to oppose such justice but to expose it. Therefore, you may if you wish, I will not further testify under the jurisdiction of this Court. You may by your inclination on my

behalf do as you see fit. I will not testify any further.

Mr. Brown: Would you retain your seat, Mr. Sarner, please. If your Honor please, at this time, I can only say that Mr. Sarner has expressed his view here, and I think your Honor has full cognizance of the impact of this matter and of its import and of its history completely. There is very little that I can say at this time. I think this man, with respect I have thought, demonstrated to this Court, I think your Honor too has observed, his forthrightedness, tendency to cooperate completely with the Court and at this time I can only say that he expresses himself as he indicated he felt. But I do know your Honer is understanding this situation and I am sure you will consider it.

The Court: I will duly consider it at the appropriate time. All right, you may proceed.

Mr. Losche: Now, this contempt has occurred in the face of the Court.

The Court: That is right.

Mr. Losche: I ask the Court to commit the witness immediately.

Mr. Brown: I say to you there has been no contempt in the face of the Court. There is nothing before the Court at this time. There has been an expression that I submit you your Honor has to be submitted in the light that this is a Court of Equity.

The Witness: May I say this by reason of what I voiced. I am in contempt on such justice and will stand in contempt of such justice. By such reason I have a right, and not only a right but a duty to do so. On this basis I will defend myself in contempt. First, before we continue, I am not in contempt of the Court. I am in contempt of the abomination of the justice there. That is what I am in contempt of.

The Court: There will be no speech making. You

asked permission to make the statement. You were granted that right. In due time I will consider what will be done in connection with what you have said. You may proceed with your examination.

The Witness: I will stand on my right not to be maligned and further procedure in this case until my points are proven true or false. These have been made here. There was not one iota of proof before your Honor by their own witnesses that showed I abandoned."

The appellant then refused to respond to certain questions asked him which follow (Apx 8a-35 to 42):

"Q. Mr. Sarner, what is your business? A. I have made my decision before what I intend to do. This I will stand by.

The Court: You may answer the question.

The Witness: I answered it. I advised the Court what I intended to do and I stand by it."

As a result of these remarks counsel for the appellant's wife moved that the court summarily commit the appellant for contempt (Apx 7a-18 to 38). No disposition was made of this suggestion by the trial court at that time. When the matrimonial hearing was continued the following day, December 4, 1957, Judge HEGARTY announced that the contempt charge would be disposed of on December 5, 1957 (Apx 34a-10 to 13). While the record does not disclose why the contempt proceeding did not commence on the next day, it was in fact adjourned until Judge HEGARTY on March 6, 1958, certified to the assignment judge of Bergen County that the appellant had committed a contempt before him (Apx 2a-4a). This action was in obedience to R.R. 4:87-2(d) which disqualifies a trial judge from presiding at hearings on charges of contempt arising from

disrespect or criticism of himself. On March 10, 1958, Superior Court Judge J. WALLACE LEYDEN issued an order for the appellant to show cause on March 27, 1958 why he should not be adjudged guilty of contempt (Apx 1a).

On March 27, 1958 the matter was assigned to and scheduled for hearing before Superior Court Judge DAVID A. NIMMO (Apx 11a to 24a). A transcript of the hearing at which the alleged contempt had been committed was made part of the record before Judge NIMMO. The appellant in open court before Judge NIMMO conceded its accuracy (Apx 18a-12 to 19a-21). Though no further evidence was offered either in support of or against the charge of contempt, the appellant demanded a jury trial (Apx 20a-29). While Judge NIMMO had discretion to honor this request he refused to do so because in view of the admission concerning the accuracy of the transcript there were no questions of fact to be resolved (R.R. 4:87-3; Apx 20a-30 to 40). Judge NIMMO thereupon found the appellant guilty and sentenced him to 60 days in the Hudson County Jail (Apx 25a).

The action by the trial court in the contempt proceeding was in accord with the general New Jersey rule that "[w]here in the trial of an action there were no disputed facts or disputed inferences to be drawn from the undisputed facts, it devolves upon the court to declare the judgment which the law imposes." *Kaufman* v. *Pennsylvania R.R. Co.*, 2 N. J. 318, 324, 66 A. 2d 527, 529 (1949); *Ferdinand* v. *Agricultural Ins. Co.*, 22 N. J. 482, 126 A. 2d 323 (1956); *Genovay* v. *Fox*, 29 N. J. 436, 149 A. 2d 212 (1959). In criminal cases the determination of whether a given set of facts constitutes a crime is similarly for the court. Thus in *State* v. *Schneiderman*, 20 N. J. 422, 120 A. 2d 89 (1956) it was held proper for a trial judge to charge the jury that

if the defendant maintained a contrivance operable in a given manner it was a gambling machine.

Appeals to the Appellate Division and the Supreme Court resulted in affirmance of the action of the Chancery Division, 28 N. J. 519, 147 A. 2d 244. The opinion of the Appellate Division adopted by the Supreme Court held that the trial court had not abused its discretion in denying a jury trial. Following the appeal to this Court, James A. Major, Esq., who had theretofore prosecuted the action on behalf of the State asked for and received permission to withdraw from the case. The Attorney General was then designated by the Supreme Court of New Jersey as attorney to defend this appeal (Appendix A attached hereto) pursuant to R.R. 4:87-2(c) which provides:

> "(c) The court may designate as prosecutor of the proceeding, the Attorney General, the county prosecutor or any other attorney of this State."

## *ARGUMENT*

## POINT I

### The appellant fails to present a substantial federal question which may be reviewed by this Court.

The appellant urges four bases on which this Court may note jurisdiction. He claims that the fourteenth amendment to the United States Constitution was infringed because (a) of the allegedly inadequate notice given him, (b) the denial of a trial by jury, (c) the "summary" procedure in the Chancery Division of the Superior Court, and (d) the restriction of his freedom of speech.

None of these contentions was timely advanced in the New Jersey courts and thus the appeal should be dismissed. One of the fundamental jurisdictional principles of this

Court is that it will not consider constitutional points not properly presented below. *Edelman* v. *California*, 344 U. S. 357, 73 S Ct. 293, 97 L. Ed. 387 (1953); *Shelley* v. *Kraemer*, 334 U. S. 1, 8-9, 68 S. Ct. 836, 839-40, 92 L. Ed. 1161 (1948); *Corrigan* v. *Buckley*, 271 U. S. 323, 46 S. Ct. 521, 70 L. Ed. 969 (1926); *Matheson* v. *Branch Bank of Alabama*, 48 U. S. (7 How.) 260, 12 L. Ed. 692 (1849).

The question of inadequacy of notice was never raised in the trial or appellate courts of New Jersey and is being advanced for the first time here. Even if the appellant prior to the contempt hearing had been confused as to whether the proceeding against him would be criminal or civil in nature he was directly told of its criminal nature at the hearing. Upon being so advised he did not seek an adjournment nor did he claim that his alleged misunderstanding affected the validity of the proceedings (Apx 17a-30 to 40). Thus he made no effort to preserve his position in this regard and on the prior appeals the point was never considered by the Appellate Division or Supreme Court of New Jersey. The appellant in the Chancery Division though claiming a "constitutional right" to a jury trial never specified whether this "right" was derived from the federal or state constitution (Apx 18a-3 to 11). On appeal the Supreme Court and Appellate Division entertained the argument that the federal constitution had been infringed by the denial but disposed of it as being unsound and not worthy of consideration, 28 N. J. at 524, 147 A. 2d at 247. In doing so, the New Jersey Supreme Court relied on the decision of this Court in *Green* v. *United States*, see Point II, *infra*.

In no other manner did the appellant complain of the otherwise "summary" nature of the proceeding to the Chancery Division. While this point was raised on appeal, the Supreme Court refused to pass upon it pursuant to its

usual policy of declining to entertain constitutional positions not taken in the trial courts. See *Lettieri* v. *State Bd. of Medical Examiners*, 24 N. J. 199, 131 A. 2d 518 (1957); *Brogan* v. *Passaic Daily News*, 22 N. J. 139, 123 A. 2d 473 (1956).

The claim of infringement of the right to free speech as secured by the fourteenth amendment was never advanced in the Chancery Division. Though argued on appeal in the New Jersey appellate courts the issue cannot be deemed properly preserved inasmuch as the opinion of the Appellate Division, adopted by the Supreme Court, considered this contention under the state but not the federal constitution, 28 N. J. at 523, 147 A. 2d at 246.

In any event, each of these claims is reviewed and rebutted in Point II, *infra*, as being specious and without any merit.

## POINT II

**The federal questions raised on this appeal are insubstantial.**

The record shows that the federal questions raised in this case are frivolous. At every state of the proceedings in the New Jersey courts the appellant had adequate constitutional protections and was treated with fundamental fairness. He certainly had adequate notice of his hearing. On December 4, 1957 during the matrimonial action Judge HEGARTY told him that he would be tried for contempt (Apx 34a-11 to 13). On March 6, 1958, Judge HEGARTY certified that the appellant had been guilty of contempt. (Apx 2a to 4a). An order to show cause why he should not be adjudged guilty of contempt issued to the appellant on March 10, 1958, returnable 17 days later on March 27, 1958. (Apx 1a). This notice can hardly be deemed too short. See *Roller* v. *Holly*, 176 U. S. 398, 20 S. Ct. 410, 44 L. Ed.

520 (1900). Further no adjournment was sought nor did the appellant suggest that he had had inadequate opportunity to prepare. In any event the appeal in the Appellate Division and the Supreme Court was heard *de novo*, both as to the law and as to the facts. 28 N. J. at 525 147 A. 2d at 247. Though both appeals were tried on the record had the appellant desired to introduce new evidence he could have sought leave to do so since the New Jersey Constitution gives the Appellate Division and the Supreme Court such original jurisdiction as is necessary to dispose of any case before it, *New Jersey Constitution of 1947*, Art. VI, §5, par. 3; *State* v. *Ferrell*, 29 N. J. Super. 183, 102 A. 2d 70 (App. Div. 1954); see *Coleman* v. *Newark Morning Ledger Co.*, 29 N. J. 357, 149 A. 2d 193 (1959). Further as was noted in Point I, *supra*, there was no question of fact to be resolved. While this Court has emphasized that unfair procedural rulings may not be invoked to preclude presentation of *facts*, as distinguished from questions of law, *cf. F. C. C.* v. *WJR*, 337 U. S. 265, 69 S. Ct. 1097, 93 L. Ed. 1353 (1949), the appellant had every opportunity, in any event, to prepare for his defense, including the legal arguments he intended to advance The Supreme Court of New Jersey recently reviewed this question of an opportunity to be heard on questions of law as it related to problems of procedural fairness. In *Arthur Venneri Co.* v. *Housing Authority of City of Paterson*, 29 N. J. 392, 149 A. 2d 228, decided March 10, 1959, the low bidder on a public contract appealed the action of the public authority refusing to award it the contract and denying it a hearing to determine if it were responsible. The reason for the administrative action had been that the contract was to be partially financed with federal funds and the contractor had been disqualified under federal law from bidding on any such contract because of an attempt to bribe a federal officer. The Supreme Court of New Jersey held that inas-

much as the only question involved was of law the denial of a hearing before the agency was without significance since on appeal the Supreme Court could ascertain the law for itself.

The contention that a jury trial is required by the fourteenth amendment for a hearing on a charge of criminal contempt before a state court is contrary to all precedent. *Eilenbecker* v. *District Ct.*, 134 U. S. 31, 10 S. Ct. 424, 33 L. Ed. 801 (1890); *Fisher* v. *Pace*, 336 U. S. 155, 69 S. Ct. 425, 93 L. Ed. 569 (1949); see *Green* v. *United States*, 356 U. S. 165, 183 n. 14, 78 S. Ct. 632, 643 n. 14, 2 L. Ed. 2d 672 (1958). *Eilenbecker* v. *District Ct.* was in this Court on a writ of error from the Supreme Court of Iowa which had affirmed the convictions of the plaintiffs in error for criminal contempt in violating injunctions restraining them from selling alcoholic beverages. The plaintiffs in error had been fined $500 and costs and had been sentenced to three months in jail, such prison term to abate, however, if the fines were paid within thirty days. This Court squarely held that such a sentence could be imposed by the court without a jury trial and that the fourteenth amendment was never "* * * intended to interfere with or abolish the powers of the courts in proceedings for contempt, whether this contempt occurred in the course of a criminal proceeding or a civil suit" 134 U. S. at 39, 10 S. Ct. at 427. There is nothing in the record which would justify a retreat from the frequently reaffirmed *Eilenbecker* rule. It is clear enough that if the federal constitution does not require a jury trial in the federal courts for criminal contempts there committed, *Green* v. *United States, supra,* that the fourteenth amendment would not place a greater burden on the states. *Cf. Wolf* v. *Colorado,* 338 U. S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949).

The appellant's position that the proceeding below was summary is not supported in the record. A summary dis-

position of a contempt of court means an adjudication by the judge before whom the contempt was committed with the defendant being denied an opportunity to be heard. Compare *Sacher* v. *United States*, 343 U. S. 1, 72 S. Ct. 451, 96 L. Ed. 717 (1952) and *Brown* v. *United States*, 356 U. S. 148, 78 S, Ct. 622, 2 L. Ed. 2d 589 (1958) with *Green* v. *United States, supra*. In view of the facts that the proceeding below was on notice through an order to show cause and the appellant had an opportunity to present witnesses and argue the law the hearing was plenary in the constitutional sense. In any event, inasmuch as the contempt was committed in the face of the court, summary adjudication would have been consistent with the federal constitutional guarantee of due process of law. In *Brown* v. *United States* this Court held that a witness before a federal district court who wrongfully refuses to answer questions has committed a contempt within the presence of the court and may be summarily adjudicated to be in criminal contempt.

Finally, the suggestion that a witness has a federal right originating in the protection of free speech to deliver an unsolicited attack upon the integrity of the trial judge, *Fisher* v. *Pace*, 336 U. S. 155, 163, 69 S. Ct. 425, 428-29, 93 L. Ed. 569 (1949), or to refuse to answer questions may not be accepted. *Brown* v. *United States, supra*. In *Fisher* v. *Pace* this Court was faced with a decision affirming a contempt conviction of an attorney who refused to abide by a ruling of a trial judge and engaged in an altercation with the judge. The Court held:

> "We cannot say, however, that mildly provocative language from the bench put a constitutional protection around an attorney so as to allow him to show the contempt for judge and court manifested by this record, particularly the last few sentences of the altercation." 336 U. S. at 163, 69 S. Ct. 428-29.

And *Brown* v. *United States* affirmed a contempt conviction of a witness who had unjustifiably refused to answer questions.

## CONCLUSION

**For the foregoing reasons, it is respectfully submitted that this appeal should be dismissed or in the alternative the judgment of the Supreme Court of New Jersey should be affirmed.**

Respectfully submitted,

David D. Furman,
Attorney General of New Jersey,
*Attorney for Appellee.*

David M. Satz, Jr.,
Deputy Attorney General,
*Of Counsel.*

Morton I. Greenberg,
Deputy Attorney General,
*On the Brief.*

## APPENDIX A

OFFICE OF THE CLERK
SUPREME COURT OF NEW JERSEY
STATE HOUSE ANNEX
TRENTON, N. J.

JOHN H. GILDEA
CLERK

March 4, 1959

David M. Satz, Jr., Assistant Attorney General
State House Annex
Trenton, New Jersey

Re Sarner vs. Sarner

Dear Mr. Satz:

In this matter Mr. James A. Major has appeared throughout at the request of the Superior Court. On the appeal to the United States Supreme Court Mr. Major has asked to be relieved and the Supreme Court requests that the Attorney General appear on behalf of the respondent in the United States Supreme Court.

Very truly yours,

/s/ JOHN H. GILDEA